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No. 06-1614

IN THE

Supreme Court of the United States

POOH BAH ENTERPRISES, INC., *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

SUPPLEMENTAL BRIEF OF PETITIONERS

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Petitioners respectfully submit this brief as supplemental authority pursuant to Rule 15.8 of the Court's Rules.

On August 30, 2007, after Petitioners submitted their Reply Brief, the United States Court of Appeals for the Sixth Circuit issued a decision in *Hamilton's Bogarts, Inc. v. State of Michigan*, No. 06-1436, slip op. (6th Cir., Aug. 30, 2007) (attached hereto as Appendix 1). That court reversed a district court decision denying preliminary injunctive relief to bar enforcement of a state law regulating nude or topless dancing in establishments where liquor is sold. The Sixth Circuit held, *inter alia*, that remand was necessary to determine the appropriate standard of review and to evaluate whether the government had met the necessary burden of proof. *Id.* at 10a-13a.

The decision in *Hamilton's Bogarts, Inc.* addresses directly the first two questions raised in the instant Petition. The Sixth Circuit held that a reviewing court may not simply assume that a state regulation of erotic dancing where alcohol is served is content neutral, since the state "fails to even articulate what its interest is or how the regulations affect it." *Id.* at 13a. Some tangible demonstration of the government's purpose is necessary to permit the court to determine whether strict or intermediate scrutiny applies, and thus "is critical to [the law's] validity, as it has great bearing on the justifications the state must raise to defend the rules." *Id.* at 11a. The Sixth Circuit expressly rejected the state's claim of "broad discretion" to regulate establishments that sell alcohol as non-expressive conduct, *id.* at 9a-13a, contrary to both the Illinois Supreme Court's reasoning below (App. 17-19) and the City of Chicago's Opposition. Opp. at 9-11.

The Sixth Circuit also held that even where intermediate scrutiny is the applicable standard of review in a case such as this, the government's evidentiary burden "is not toothless" but instead "requires **some** showing of an important or substantial interest that the regulations are essential to address." *Id.* at 13a (emphasis in original). In this regard, when the government defends a regulation of speech "as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Id.* (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). Rather, it must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.*

The decision underscores the need for Supreme Court guidance in this area, as the Sixth Circuit noted that the fractured opinion in *City of Erie v. Pap's AM*, 529 U.S. 277 (2000) "demonstrates the complicated nature of the analysis." *Hamilton's Bogarts, Inc.*, slip op. at 12a n.7. It also highlights

the divergent rulings among the various circuits on both the applicable First Amendment standard of review (Pet. at 15-17; Reply at 5) and the government's burden of proof with respect to purported secondary effects of adult entertainment. Pet. at 23-25; Reply at 7-9. This, along with other recent circuit court decisions issued since the Petition was filed (Reply at 8-9), illustrates the urgent need for clarification by this Court.

Respectfully submitted,

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